Carlson Roofing Co., Inc. *and* General Chauffeurs, Helpers and Salesdrivers Union No. 325, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 33-CA-4414

March 30, 1981

DECISION AND ORDER

On September 22, 1980, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in answer to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommneded Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge: The charge in this case was filed on August 17, 1979, by General Chauffeurs, Helpers and Salesdrivers, Local Union No. 325, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union or the Teamsters. The complaint issued on September 21, 1979, alleging that Respondent Carlson Roofing Co., Inc., voluntarily recognized the Union as the exclusive representative of certain of its truckdrivers in February 1978, and has failed and refused to recognize and bargain with the Union since June 20, 1979, thereby violating Section 8(a)(1) and (5) of the Act. In its answer Respondent denied the commission of any unfair labor practices.

A hearing was held before me in Rockford, Illinois, on March 25, 1980. At the conclusion of the hearing the parties waived oral argument and were given leave to file briefs, which have been received from the General Counsel and Respondent.

Upon the entire record in this case including my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a contractor engaged in commercial and industrial roofing construction and repair. Its principal office is in Rockford, Illinois. Respondent annually purchases goods and materials valued in excess of $50,000 which are transported to it directly from points outside the State of Illinois. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

1. Introduction

For a number of years, Roofers Local Union 6 has represented, under collective-bargaining agreements, Respondent's journeymen roofers, apprentices, helpers, working foremen, and all employees engaged in the application and installation of roofing materials. In addition to the work described in the agreement, the roofing employees have also driven Respondent's vehicles, carrying crews and materials to and from jobsites.

For some years Respondent maintained a fleet of trucks which included single-axle crew trucks or stake trucks, pickup trucks, maintenance trucks, and one-crane truck, which the roofing employees drove in conjunction with their duties. Respondent also had an orange single-axle semitractor and a red Ford double-axle semitractor which were used by roofers to pull trailers from one point to another on jobsites and to haul materials to and from jobsites.

Through 1977, Respondent utilized a common carrier, Hartwig Transit Company, for additional trucking services requiring semitractors and trailers. Hartwig assigned two tractors and drivers to haul roofing materials and gravel from suppliers to jobsites. The drivers of these trucks, Fred Buser and Jeff Wilmarth, were not members of any labor organization. In late 1977, Respondent bought a red and white double-axle semitractor, and at about the same time Respondent hired Buser and Wilmarth as part-time drivers. In their work for Respondent they alternated in driving the newly purchased tractor. They performed no roofing work but occasionally assisted roofers in unloading materials from trailers. At the time of Buser's hire, Respondent's vice president, Larry Carlson, told him that they would pay Buser at a rate equal to what he received from Hartwig and that he would make provision for health insurance and pension benefits comparable to what Buser received from

Hartwig.[1] Buser in turn communicated Carlson's intentions to Wilmarth who started to drive for Respondent shortly after Buser. While working part-time, for Respondent, Buser and Wilmarth continued as full-time drivers for Hartwig, hauling for Respondent.

2. The February 14, 1978, meeting between Respondent and the Union

In late 1977, some of Respondent's roofing employees complained to Schultz, the business agent of Roofers Local Union 6, that Respondent had purchased a new semitractor and hired a nonunion driver. Schultz in turn transmitted the complaint to Teamsters business representative, Giardono, identifying Buser as the driver in question. Thereafter, Giardono called Glenn Torpoff, executive director of Northern Illinois Building Contractors Association (NIBCA) of which Respondent is a member and, at Giardono's request, Torpoff arranged for a meeting on February 14, 1978, between Giardono and Larry Carlson at Torpoff's office.

At the meeting, Giardono told Carlson that he understood that Respondent had some new semitractors and trailers which were being driven by nonunion drivers and that other union business agents were complaining about nonunion drivers coming onto union jobs. Giardono said that he wanted the drivers of the semi-tractors to carry Teamsters cards and that as long as they were working full-time he would not object if roofers occasionally drove the trucks. Giardono also said that he was not concerned about the smaller trucks which were traditionally driven by roofers. There was some discussion of the possibility of having those who drove the semitractors carry dual cards so that they would be able to perform nondriving duties, and Giardono said that there were such arrangements with other employers. Giardono said that the men with the Teamsters cards should be paid the wages, pension, and health and welfare benefits provided by the Teamsters agreement with NIBCA. Giardono gave Carlson one or two checkoff authorization cards for employees to sign.

To this extent the testimony of Giardono and Carlson as to the February 14 meeting is in basic agreement. However, their testimony is in conflict as to further discussion of the Teamsters contract. According to Giardono, he initially said that he would give Carlson a copy of the contract, but then asked Torpoff to give Carlson one. Giardono testified that he said he wanted Carlson to sign the contract and that Torpoff replied there was no need for Carlson to sign an agreement since Respondent was a NIBCA member. Carlson testified that Giardono specifically stated that he did not expect Carlson to sign a contract. Torpoff testified he did not remember that there was any discussion about whether Carlson should sign a contract or that he told Giardono that it would not be necessary for Respondent to sign a contract. With respect to the latter, Torpoff testified that it would have been highly unusual and nearly impossible for him to have made such a remark because NIBCA did not have the written consent from Carlson, required by its bylaws, to bind Carlson to the NIBCA contract with the Union. While Torpoff's overall recollection of the February 14 meeting was less complete than that of Giardono and Carlson, I am persuaded that his testimony as to discussion of signing a contract is more accurate than that of Giardono or Carlson. With respect to Giardono, his testimony makes it clear that at the time of the meeting he was under the erroneous impression that Respondent was bound by the NIBCA contract. In this circumstance, I find it more likely that he did not ask Carlson to sign the contract because he did not believe it necessary to do so than that Torpoff, who knew the requirements of the bylaws, erroneously assured Giardono that it was not necessary for Carlson to sign. At the same time, with respect to Carlson, I find it highly likely that Giardono disclaimed any expectation of having a signed agreement. I conclude that Torpoff did not remember discussion about signing a contract because no such discussion occurred and that the recollections of Giardono and Carlson were colored by their separate impressions of what the result of the meeting had been and the substantial passage of time before the events of the meeting became an issue.

Following the February 14 meeting, Larry Carlson reported to Respondent's president, Ed Carlson, what had happened and they agreed to ask Buser to join the Union. Carlson then asked Buser if he had any objections to becoming a member of Teamsters and offered to pay Buser's initiation fee and 3 months' dues if Buser would pay his own dues thereafter. Buser agreed to do so. About a month later, Giardono called Larry Carlson to complain that Wilmarth was also driving and was not a member of the Teamsters. Carlson then asked Wilmarth if he would be willing to join the Teamsters, making the same offer to pay his initiation fee and first 3 months' dues. Wilmarth also agreed to join. Although Wilmarth, and possibly Buser, signed union authorization cards at the time Carlson asked them to join the Union, Respondent did not check off dues on their behalf, but both maintained their Teamster membership through direct payment of dues to the Teamsters following their first 3 months of membership.[2]

In March 1978, Respondent began to remit pension and health and welfare contributions for Buser to the Construction Industry Funds showing him as a member of the Union. In April, Respondent began to remit such contributions on Wilmarth's behalf. At around the same time Buser and Wilmarth stopped working for Hartwig and became full-time employees of Respondent. As Carlson had earlier indicated to Buser, Respondent paid them at the same hourly rate as Hartwig. That rate differed from the rate required by the union contract.

3. The negotiation of a new area agreement

The area agreement to which the Teamsters was a party was scheduled to expire in July 1978. On April 10,

[1] While it is not clear from the record, it appears that the discussion of pension and insurance benefits was in anticipation of eventual full-time employment of Buser and Wilmarth by Respondent.

[2] Buser testified that he signed some papers for the Teamsters at Respondent's request but did not remember what they were. Wilmarth was asked to sign a checkoff form and did so, and it seems likely that Buser also did.

1978, Giardono sent a form letter to Respondent giving 60 days' notice of the Union's desire to negotiate changes in the agreement. On April 13, Carlson spoke to Torpoff and wrote NIBCA to go on record that it did not represent Respondent in negotiations, but Respondent did not reply directly to Giardono's letter. On July 5, Giardono sent a form letter to Respondent announcing the wage and benefit increases of the new area agreement which had been reached and enclosing a Memorandum of Agreement for Respondent's signature. Respondent did not sign the agreement and did not reply to Giardono's letter.

4. The Peterson grievance and subsequent events

In 1979, Respondent purchased an additional brown and white double-axle semitractor. Until its purchase, Buser and Wilmarth had alternated driving the red and white semitractor but thereafter each was regularly assigned one of the two newer semitractors to drive.

In March 1979, Giardono was informed that Ralph Peterson, a nonunion employee of Respondent, was driving trucks for Respondent. Giardono filed a grievance with Respondent but received no response. He then called Torpoff and requested a grievance meeting as provided in the grievance procedure of the area agreement. When no meeting was scheduled, Giardono told Torpoff that he would present the grievance to the Joint Area Committee, but that he would attempt to settle the grievance directly if Torpoff was able to set up a meeting with Respondent. On March 27, 2 days before the next scheduled Joint Area Committee meeting, Giardono received a copy of a letter from Respondent's attorney stating that Respondent had no contract with the Teamsters and therefore would not attend the committee meeting.

On April 2, the Committee decided the grievance in favor of the Union and awarded 3 days' backpay as a remedy. Shortly thereafter, Giardono told Torpoff that if Respondent did not comply with the decision, the Union would strike. Torpoff asked Giardono to wait until Respondent received the decision and offered a meeting with Respondent.

On April 5, 1979, Giardono, Larry Carlson, Respondent's office manager, Jarvi, and Roofers business agent, Schultz, met. After some discussion of Peterson's work, Giardono stated he wanted Carlson to pay the amount awarded by the Joint Area Committee. Carlson responded that he was not obligated to pay since Respondent never had a collective-bargaining contract with the Union. Giardono replied that Respondent was bound to the agreement with the Union because it was a member of NIBCA. Carlson denied that Respondent had entered into an agreement with the Union at the February 1978 meeting and said that Giardono had only asked to have the two men become Teamsters and receive benefits. Torpoff arrived at the meeting after it started and, when questioned by Giardono, denied that he had told Giardono at the February 1978 meeting that Respondent was bound to the area agreement because of its membership in NIBCA. Giardono threatened to strike Respondent if the award was not paid, and Carlson suggested they continue the discussion and seek another means of resolving the disagreement. Carlson expressed concern that the Union was taking over roofing companies, and Giardono told Carlson that the Union did not want to take over Respondent's operation but only wanted to represent the full-time semitractor drivers. Giardono offered to put his claim in writing. At the close of the meeting Giardono said that he was going on vacation and that if the award was not paid by his return he would strike Respondent.

That evening, Carlson called Giardono at his home and asked how they could settle the dispute. Giardono responded that the only settlement he would consider would be payment of the grievance and a signed contract. Giardono again said that he would strike and added that he would file charges with the National Labor Relations Board.

Sometime after Giardono returned from his vacation, as a consequence of a conversation between Carlson and Schultz, Giardono prepared a proposed contract addendum providing that Respondent recognize the Union as the exclusive representative of all "six-wheel dump, semi-dump and flat bed truck drivers employed by the Employer, but excluding outside and inside sales persons, office clerical employees, guards, supervisors, and work traditionally performed by members of Roofers Local Union No. 6, except as provided above." Schultz delivered the addendum to Carlson who refused to sign it.

On June 20, 1979, the Union's attorney made a written demand for bargaining for Respondent's "Drivers of all six-wheel dump and semi-dump trucks and flat bed trucks but excluding outside and inside sales persons, guards, office clerical employees, supervisors and other work traditionally performed by members of Roofers Local Union No. 6." On July 2, Respondent's attorney replied that Respondent doubted the appropriateness of the unit requested and the Union's claim to represent a majority of those in any appropriate unit. Thereafter, the Union filed the charge in this case.

B. *Concluding Findings*

The General Counsel contends that Respondent's full-time semitractor drivers constitute an appropriate unit for collective bargaining and that on February 14, 1978, Respondent voluntarily recognized the Union and entered into a prehire agreement with the Union, giving rise to a continuing obligation for Respondent to bargain with the Union after Buser and Wilmarth became members of the Union. Respondent contests both the appropriateness of the unit and the claims that it recognized the Union and entered into an agreement with it.

Assuming that a unit of Respondent's full-time semitractor drivers is appropriate, I find that the evidence does not establish that Respondent entered into a prehire agreement with Respondent. I have found above that at the February 14, 1978, meeting, Giardono mentioned wages, pension, and health and welfare benefits, but did not ask Respondent to sign the area agreement, apparently in the mistaken belief that Respondent was bound by it through its membership in NIBCA. Carlson neither said nor did anything at the meeting to indicate that Respondent agreed to be bound by the area agreement. After the meeting, as Giardono had requested, Carlson asked Buser and Wilmarth to join the Union, and Re-

spondent paid their initiation fees and 3-month dues. Respondent also made health and welfare and pension contributions for them, corresponding to those required by the area agreement, but Respondent did not pay them contract wages, nor did it check off dues in their behalf. Respondent never replied to the Union's request for bargaining for a new agreement in April 1978, only a few months after the purported recognition, and it did not sign and return the new memorandum agreement sent to it by Giardono in July. Whatever affirmative indication of Respondent's intention to become a party to the agreement with the Union may be drawn from its recruitment of Buser and Wilmarth to join the Union and its contributions to the Construction Industry Funds, the other factors summarized above give a contrary indication. Respondent did not engage in a course of conduct designed to lead the Union to believe that it had become a party to the area agreement. Rather, if anything, it was Giardono's preexisting belief as to the consequences of NIBCA membership which led him to assume that Respondent was bound by the area agreement and to stop short of asking Respondent to become a party to that agreement. In these circumstances I find that Respondent was not a party to or bound by the area agreement.[3]

The General Counsel contends in the alternative that Respondent was obligated to bargain with the Union following its June 20, 1979, formal request to bargain because Respondent had direct personal knowledge that its two full-time drivers executed checkoff authorization forms and were members of the Union, relying on *Nation-Wide Plastics Co. Inc.*, 197 NLRB 996 (1972), and *E. S. Merriman & Sons, etc.*, 219 NLRB 972 (1975). As set forth, the evidence shows that Buser and Wilmarth became members of the Union when Larry Carlson approached them and asked them to do so, offering at the same time to pay their initiation fees and 3-month dues. At least one of them also signed a checkoff authorization. Apart from any other consideration, in the absence of any prehire union-security agreement between the Union and Respondent, the manner in which the checkoff authorizations and memberships were obtained precludes reliance upon them as evidence of the Union's majority.[4]

Accordingly, I conclude that Respondent was not obligated to bargain with the Union at the time of the Union's demands for bargaining in the spring of 1979 and shall recommend that the allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Carlson Roofing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Chauffeurs, Helpers and Salesdrivers Local Union No. 325, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish that Respondent has engaged in unfair labor practices as alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[5]

The complaint is dismissed in its entirety.

[3] Cf. *J. D. Industrial Insulation Company*, 234 NLRB 163, 167–168 (1978), enfd. as modified 615 F.2d 1289 (10th Cir. 1980); *Marquis Elevator Company, Inc.*, 217 NLRB 461, 465–466 (1975).

[4] *Central Casket Co.*, 225 NLRB 362, 400–401 (1976). *Sopps, Inc.*, 175 NLRB 296 (1969).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.